

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293**

RAYMOND ORR,
Appellant

v.

TOWN OF CARVER,
Respondent

CASE NO: D1-08-242¹

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Raymond Orr and the Town of Carver (Carver), acting pursuant to G.L.c.31, §41A, jointly requested a hearing by a disinterested hearing officer concerning Carver's assertion that the Appellant, an officer in the Carver Police Department (CPD), be disciplined for interfering with overtime rights of other CPD officers who were potential witnesses adverse to the Appellant in a prior appeal, then pending before the Civil Service Commission (Commission). Evidentiary hearings were held at the University Of Massachusetts School Of Law in Dartmouth before a designated member of the Commission on February 24, 2009, June 12, 2009 and August 25, 2009, and digitally recorded. The hearings were declared private as no party requested a public hearing. Witnesses were sequestered. The parties submitted post hearing memoranda on November 30, 2009.

¹ The parties simultaneously requested a second G.L.c.31, §41A hearing on other pending charges against the Appellant (Commission Case No. D1-08-241). By agreement, the present case was heard first and Case D1-08-241 was deferred pending the Commission's Decision in the present matter.

FINDINGS OF FACT

Giving appropriate weight to the exhibits and the testimony of witnesses (the Appellant, then CPD Chief Parker, Sergeants Michael Miksch & Mark Duphily, Detective David Zadok and Officer Anthony Luca) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Raymond Orr, joined the CPD in 1984 and has been a tenured permanent police officer since 1988. At the time of this appeal, he was the second most senior member (second to Officer Anthony Luca) on the force of approximately 16 sworn officers. (*Testimony of Appellant & Parker*)

2. The CPD command staff includes the Chief, an Administrative Sergeant and three Patrol Sergeants. Arthur Parker became CPD Police Chief in July 2004. He previously served as Police Chief in Williamstown, MA. The previous permanent CPD Police Chief was Diane Skoogs. Chief Parker described the CPD at the time he became Chief as “one of the five worst dysfunctional departments in the Commonwealth.” (*Testimony of Parker*)

3. In 2005, Chief Parker promulgated a comprehensive Manual of Rules and Regulations to codify the government of the CPD, which each officer was provided and required to acknowledge its receipt. The rules that appear germane here include:

7.0 PUBLIC STATEMENTS

...

RULE 7.3 – COURTESY

Officers shall not be discourteous or inconsiderate to the public, to their superior officers, or to their fellow officers and employees of the police department as well as other law enforcement and governmental agencies. They shall be tactful in the performance of their duties and are expected to exercise the utmost patience and discretion even under the most trying circumstances.

Officers shall answer questions from citizens in a courteous manner and, if unable to supply an answer, shall make every effort to obtain the answer for the citizen, avoiding argument and unnecessary conversation.

RULE 7.7 – TRUTHFULNESS

Officers shall speak the truth at all times while on duty or when discussing a matter arising out of or related to the officers [sic] duties or the operation, organization or business of the department. In cases in which an officer is not allowed by the regulations of the department to divulge facts within his or her knowledge, the officer will decline to speak on the subject.

Officers shall not fabricate, withhold or destroy evidence of any kind.

13.0 – REPORTS

RULE 13.1 – FILING REPORTS

Officers shall promptly, truthfully and accurately complete all reports and forms as required by this Manual, by law, and by departmental regulations or policies and procedures.

RULE 13.2 – FALSIFYING RECORDS

Officers shall not knowingly enter or cause to be entered upon any police report or police record inaccurate, false or improper information.

(Exh. 23; Testimony of Chief Parker)

4. Officer Orr was promoted to Sergeant in 1990, and served as a shift commander on the 4 pm to midnight shift. He has also served as a member of the CPD dive team for which he was recognized by the commander of the Southeastern Massachusetts Dive Team for his contribution to a search operation to locate a vessel that had sunk off Nantucket in 2007. He was also cited by Chief Parker for his “great police work” that “further illustrates the job you do daily to protect and serve the Town of Carver.” *(Exhs. 24 & 42; Testimony of Appellant)*

5. The Carver Police Union (Police Union) is the exclusive collective bargaining unit for the CPD’s Patrol Officers and Sergeants. The Appellant served as the Police Union Vice-President from 2000 to 2001, and two terms as President, once from 1993 to 2000 and, again, briefly during 2002. He was an active union advocate who won, among other things, a back-pay arbitration award for himself over a grievance he had filed over shift bids. *(Exhs. 20 & 37; Testimony of Appellant)*

6. Since approximately the late 1990s, a rift developed within the Police Union that eventually divided its membership, initially prompted by Chief Skoogs appointment of David Zadok to Detective, although Zadok was then the least senior officer in the department. This rift was exacerbated in October 2000, after Det. Zadok's son was issued a citation for driving 50 mph in a 20 mph zone, which resulted in an acrimonious confrontation with Officer Mulready, who had issued the citation. Also, during this time frame, Carver made lateral hires of seven or eight officers from the New Bedford Police Department who Officer Orr said "took over" the Police Union. One of them, Kathleen Englehart – then Det. Zadok's domestic partner and now his spouse – obtained an adjustment to her seniority date that especially riled other officers. Sergeant Orr had sided with the Police Union camp that opposed the alleged favoritism being given to Zadok, Englehart and their supporters. It was well-known that Officer Orr and Det. Zadok "did not get along very well" and, indeed, they had not spoken to each other save for essential police duties for some time. (*Exhs. 32, 37 & 38; Testimony of Appellant, Zadok, Luca & Miksch*)

7. Since 2001, Sergeant Orr has been a frequent subject of disciplinary action, beginning with a one-day suspension in December 2001 for publishing a cartoon on the Police Union bulletin board shortly after Sept. 11, 2001, which depicted Osama Bin Ladin (on which he had written Chief Skoog's call numbers) and three devils (on which he had written the call numbers of three fellow officers). The officers who received this treatment happened to be those in the opposite Police Union camp. This discipline was appealed to the Commission, which unanimously upheld the suspension in December 2006, as a "tempered, restrained response to the incident". (*Exhs. 32 & 38*)

8. In May 2003, while the 2001 disciplinary appeal was pending, Sergeant Orr was demoted to Patrol Officer for allegedly filing reports in July 2002 concerning incidents that contained false statements that denied knowledge of certain threats allegedly made against Det. Zadok and Officer Englehart arising from the confrontation with Officer Mulready. This discipline was grieved by the Police Union, which brought an unfair labor practices charge to the Commonwealth Employment Relations Board (CERB) of the Massachusetts Division of Labor Relations (Case No. MUP-03-3894), and was appealed by Officer Orr to this Commission (Case No. D-03-307). (*Exhs. 33, 37 & 38 [Orr v. Carver, CSC Docket No. D-03-307, 22 MCSR 103 (2009)]*)

9. While these administrative appeals were pending, Officer Orr received two further disciplines. On August 27, 2004, Chief Parker issued a written reprimand for speaking outside the chain of command and expressing his disapproval to a member of the Carver Board of Selectmen of Chief Parker's recommendation to make provisional appointments to sergeant of "two people from New Bedford." On November 3, 2005, Chief Parker issued a two-day suspension for failing to make a full and accurate report to Det. Zadok concerning the response to a call for assistance in removing an intoxicated spouse from the premises at her husband's request. (*Testimony of Parker; Exhs. 30 & 31*)

10. On June 30, 2008, the CERB (Byrnes, Chairman & O'Neill, Comm'r) issued an 81-page decision which found Carver in violation of M.G.L.c.150E, §§10(a)(1) & 10(a)(3), and ordered that he be reinstated to the rank of Sergeant, made whole for his losses, and prescribed other remedial injunctive relief. (*Exh. 37*)

11. On January 29, 2009, this Commission issued its decision on the appeal by Officer Orr of his demotion, in which the Commission concluded that Carver had failed

to meet its burden of proof required under M.G.L.c.31, §43 to establish just cause for such discipline and, pursuant to such law, ordered Carver to “return the Appellant ‘to his position without loss of compensation.,’ ” On February 16, 2010, the Massachusetts Superior Court affirmed the Commission’s Decision. (*Exh. 38 & Administrative Notice [Orr v. Carver, D-03-307, 22 MCSR 103 (2009), aff’d, Memorandum and Decision, C.A. No. SUCV2009-00838 (Mass.Sup.Ct. 2010)]*)

12. The dispute now presented to the Commission stems from certain actions taken by Officer Orr following a March 2007 hearing scheduled before the Commission on the prior appeal taken to challenge his demotion. The Town of Carver charges that Officer Orr made certain unauthorized entries in the Police Union overtime log book for the purpose of depriving Det. Zadok and Officer Luca of further overtime in retaliation for their appearance as witnesses for Carver at the appeal of his demotion before the Commission, and later making false statements about his actions. This is the first instance of discipline involving an officer’s alleged misconduct involving the overtime log book. The parties agreed to dispense with the appointing authority level hearing and jointly requested that the Commission hear and decide the dispute, *ab initio*, pursuant to M.G.L.c.31, §41A. (*Exh. 40; Testimony of Parker*)

CPD Overtime Practice and Procedure

13. The distribution of overtime among CPD officers is governed by the past practice of the CPD and the Police Union, as incorporated into the parties’ collective bargaining agreement, which provides, in Article VI:

“Overtime shall be equally and impartially distributed among the permanent employees of the bargaining unit and a list shall be established showing such overtime distributed. Pursuant to the parties practice, responsibility for maintenance of the list shall remain with the Union Personnel. This list shall be furnished to the Employer and posted within the Police Station.

“Full time police officers will have first refusal on all overtime. On duty union personnel will be responsible for calling in replacements for vacant shifts, except in emergency situations, at which time union personnel off duty may call.

“No officer can be ordered to work overtime unless the overtime list is called first, except during an emergency situation. If the overtime list is exhausted then the Chief or his/her designee can order an officer in to work overtime by inverse seniority. An order in list shall be established and posted by the union in the station and the least senior member next on the list shall be ordered in . . . The order in list shall start at a junior member each July 1st.”

The collective bargaining agreement also describes the similar practice regarding a seniority list for detail assignments, which appears partly intermixed (presumably a scrivener’s error), both within the last paragraph of Article VI entitled “Overtime”, and also within Article VII entitled “Details”. (*Exh. 20*) (*emphasis added*)

14. Article XVIII of the collective bargaining agreement (“Court Time”) provides:

“Appearance in any court of the Commonwealth of Massachusetts as a witness for the government at other than normal working hours shall be compensated for at one and one-half (1½) times the hourly rate of pay but in no event shall she/she receive less than four (4) hours pay. No court time will be allocated, when an officer is attending court from an incident that occurred from a previous employment. All members to receive ten dollars (\$10.00 a day meal expense for court time, if such court time goes beyond the noon hour (12 pm).”

(*Exh. 20*) (*emphasis added*)

15. The parties do not substantially dispute how the overtime distribution process is meant to work. The Police Union maintains two three-ring loose-leaf books, one for detail assignments and one for overtime, into which are placed pages of a hand-drawn form of matrix kept on a desk maintained by the Police Union in one corner of the CPD “Report Room”. The numerous copies of this matrix in evidence make clear that the form has been photocopied and recopied many times and the title of the document no longer appears on the page. The parties do not dispute that the document was created initially by the Police Union and originally bore the heading “CARVER POLICE UNION” that identified it as a Police Union document. (*Exhs. 2, 4, 5A-5E, 7 thru 14, 16 thru 18 & 43; Testimony of Appellant, Parker, Miksch & Duphily*)

16. Chief Parker agreed that the overtime book may be prepared by and maintained by the Police Union pursuant to the collective bargaining agreement, but he considered it to belong to the CPD. There was no evidence that Chief Parker or any non-Police Union personnel ever requested to see or copy the overtime book prior to the incident in question. (*Testimony of Appellant, Parker, Duphily*)

17. The overtime distribution process operates on an annual cycle. At the beginning of the cycle, a handwritten matrix form is completed and placed in the book which lists the first names of each member of the bargaining unit in order of seniority. The first overtime opportunity of the cycle must be offered to the member on the top of the list. If that member does not accept the opportunity, or is excused because of vacation, etc., the next member on the list is given the opportunity, and so forth until someone accepts. A new handwritten list is then prepared and placed in the book (often by the person taking the overtime but sometimes by another person), listing the members in the same order as the previous list, except that the person who worked the shift is "charged" for the overtime opportunity and his or her name is moved to the bottom of the new list. If no member on the overtime list accepts the shift, the shift is filled by an "order in" to officers in reverse order of seniority. There is no "charge" to that officer for being involuntarily assigned to work overtime. Overtime is awarded in this fashion throughout the year, when the cycle begins anew. (*Exhs. 2, 4, & 5A-5E, 7 thru 10, 12, 14, 16 thru 18, 41 & 43; Testimony of Appellant, Miksch & Duphily*)

18. If a person's name erroneously drops to the bottom of the list, in theory, it means that member could lose his/her next turn to receive an overtime assignment, as the person calling the list would rely on the order shown on the most recent page in the book. In

practice, however, an error may not necessarily deprive anyone of his/her turn, such as if the error were detected and fixed by the persons(s) involved soon enough or if the member was unavailable to accept the assignment or would have declined to accept it, or if the member's name was lower on the list than another member then entitled to accept the overtime opportunity first. (*Exh. 27; Testimony of Luca, Miksch & Duphily*)

19. The overtime book kept by the Police Union to track the charging of its members for working overtime shifts is distinguished from the CPD's "Weekly Time Sheet" forms that officers must complete each week in order to be paid for the time. These forms provide space in which the officer is required to identify the number of regular hours worked, days off, as well as separate blocks for "Overtime", "Court" and "Detail" hours, and a narrative space with instructions: "PLEASE EXPLAIN ALL OVERTIME, COMP. TIME, COURT AND DETAIL TIME BELOW". The officer signs the Weekly Time Sheet and submits it to a supervisor who approves the time before submitting it to payroll. (*Exhs. 1, 7 thru 11, 13, 15, 15A, 26, 29*)

20. The parties presented conflicting evidence when it comes to the understanding of the types of overtime for which an officer is supposed to be paid and/or charged. In a 2006 arbitration between Carver and the Police Union, an arbitrator rejected the Police Union's notion that Article XVIII of the collective bargaining agreement and the parties' past practices compelled Carver to pay overtime to two officers (Harriman and Rizzuto) whom Officer Orr had subpoenaed to testify before the Labor Relations Commission (in the previously mentioned Case. No. MUP-03-3894). According to the Arbitration Award:

"Sergeant Zadok, the Union Steward and a police officer for 22 years testified that he had never received payment for a non-court appearance. He *did* testify that a police officer had been paid overtime when ordered to appear at the Civil Service Commission by a former police chief."

The Arbitration Award found:

“The testimony at the arbitration revealed that there was no mutually agreed upon past practice that allowed an officer to be paid for attendance at hearings *unless ordered to be there by the Town or police chief as a witness for the Town (government).*”

“There was no evidence presented [that the Grievants] were allowed payment of overtime by the Town when witnesses were subpoenaed by the Union.”

(Exh. 21 [*emphasis added*])

21. After this Arbitration Award, the December 6, 2006 minutes of a Police Union meeting reflect the following colloquy germane to the subject of “charging” overtime:

“Any pre-planned overtime, i.e. TRIAD, PERMITS, DIVE TEAM, will be filled with the regular overtime list, when everyone else gets charged for accepting a shift, usually on Thursdays.

...
“There is *NO charge for in-service training or court.* They are *both* mandated and *basically like an order-in*”

(Exh. 41 [*emphasis added*]; Testimony of Appellant)

22. Officer Orr claimed that he believed the Arbitration Award and the Police Union meeting meant an officer should be “charged” for any “scheduled overtime” except “Court Time”, i.e., when an officer appeared in “court” to testify in a prosecution, and that administrative hearings are not “court”. This interpretation, however, is a distinct minority view, as other witnesses testified that they considered “court time” (for which an officer could be paid but would not be charged) to include, in effect, any “mandate to appear” to give testimony off-duty concerning CPD matters in any judicial or administrative proceeding. (Testimony of Appellant, Parker, Miksch & Duphily)

23. The evidence presented examples of the past practice of claiming overtime payments on the CPD Weekly Time Sheets and “charging” the time in the Police Union book going back to 2003. These records show that both Officer Orr and others have claimed overtime payments due for attending Commission hearings and other

administrative proceeding, which, prior to the 2006 Arbitration Award, were disapproved by the Police Chief as unauthorized under Article XVIII of the collective bargaining agreement. The only exception appears to have been the payment of overtime to Sgt. Miksch for his appearance at a Commission hearing in April 2006. (*Exhs. 7 thru 18*).

24. No evidence definitively established that any overtime shift requests (whether eventually paid or not) were ever actually “charged” to the officer in the Police Union book. (*Exhs. 7 thru 18; Testimony of Appellant, Parker, Luca, Zadok, Miksch & Duphily*)

The March 2007 Overtime Charge Incident

25. On March 2, 2007, the Commission had scheduled a hearing on Officer Orr’s appeal of his demotion from Sergeant, at which he appeared with counsel. Officers Luca and Englehart and Det. Zadok also appeared along with Chief Parker, former Chief Skoogs and Carver’s Town Counsel. Prior to the commencement of the hearing, Carver Town Counsel proposed a settlement to Orr’s counsel which Officer Orr was prepared to accept. About noontime, the hearing was continued to permit Carver’s Board of Selectmen also to consider the proposal. On March 3, 2007, Chief Parker issued an e-mail to all CPD personnel advising them of this development. He said he did this to “calm the waters” on this contentious case which had been a major distraction within the CPD for several years. (*Exh. 36; Testimony of Appellant Parker, Luca & Zadok*)

26. While counsel for the parties negotiated, Officers Orr and Luca made small talk. Orr recalls Luca telling him that he was getting paid for attending the hearing that day. Officer Orr had no conversation with Det. Zadok or Officer Englehart. He assumed both were there as witnesses because his counsel had told him they were both on the Town’s witness list. (*Testimony of Appellant, Luca & Zadok*)

27. Ultimately, no settlement was reached. After six full days of hearing over the next eight months, in January 2009, the Commission's Decision noted above allowed Officer Orr's appeal and ordered him restored to the rank of Sergeant. (*Exh. 38*)

28. In completing his Weekly Time Sheet for the Week Ending 3/3/2007, Officer Luca claimed 4.5 hours overtime for "Orr/Civil Service Hearing". Det. Zadok had been ordered to appear at the Commission hearing but was excused from attending. He appeared solely to bring his wife, Officer Englehart, who was then out on injury leave. He did not claim overtime for that day. (*Exhs. 1 & 29; Testimony of Luca & Zadok*)

29. On or about March 8, 2007, Officer Orr was working a "double", i.e., both the 8 am to 4 pm shift followed by his regular 4 pm to midnight shift. He said that toward the end of the night shift he noticed that none of the CPD officers who were present at the Commission on March 2, 2007 had charged the overtime book for their appearances the Friday before. He said he spoke to Officers Harriman and Rizzuto about this by cell phone and they both agreed that, based on the Labor Relations Commission arbitration decision in which they were involved and the subsequent discussion a few months earlier at a Police Union meeting, overtime received for attending a civil service hearing as a witness for the Town was "not court time" and should be charged. Officer Orr then took it upon himself to "charge" Officers Luca and Det. Zadok, placing the initials "RO" next to their names on the list and writing "Civil Service" in the Comments block. (*Exh. 2, 17, 28, 41 & 43; Testimony of Appellant & Duphily*)

30. At the time he did so, Officer Luca was 6th (out of 16 officers) from the top of the list, and Officer Zadok was 14th out of 16 (having dropped to the bottom after being charged for overtime taken a day or two earlier). (*Exh. 17; Testimony of Luca & Zadok*)

31. Officer Orr believed Officer Luca should be charged because he was on overtime. Officer Orr assumed that Det. Zadok was as well. He did not know that Det. Zadok had attended on his own time and not as a witness. Orr did not have access to CPD Weekly Time Sheets for either of the officers. When he first learned on March 21, 2007 during an interview with Carver Town Counsel that Zadok was not paid overtime for his Commission appearance, Orr said he made an “honest mistake” to have charged Det. Zadok, said he was “deeply sorry”, and apologized to counsel for the mistake. (*Exh. 43; Testimony of Appellant*)

32. Officer Orr did not charge Officer Englehart because he knew she was on injury leave, and officers on injury leave do not get paid overtime. (*Testimony of Appellant*)

33. During his shift on March 9, 2007, Det. Zadok noticed Officer Orr’s annotations in the overtime book. No new overtime opportunities had arisen at this point. At this point, no officer had lost any overtime opportunities as a result of Orr’s action. (*Exhs. 17 & 27; Testimony of Parker, Luca, Zadok & Miksch*)

34. The evidence suggests that, typically, an officer who finds an erroneous entry in the overtime book works it out with the officer who charged him or her for the overtime shift and, if an error was made, it is corrected without further action. On occasion, the Police Union Executive Board will see that a union member who was improperly charging overtime will be “spoken to.” (*Testimony of Luca, Zadok, Miksch, Duphily*)

35. Detective Zadok did not take either step, but went directly to Sgt. Miksch, who served as the CPD Internal Affairs Officer, with a verbal complaint that Officer Orr had wrongfully charged him overtime to make him look like a “rat” and it was “f---ing bullshit”. Sgt. Miksch examined the overtime book, removed the pages that reflected

Officer Orr's charge of overtime to Det. Zadok and Officer Luca, and prepared a new list which reverted the names to the order in which they appeared prior to Officer Orr's action. (*Exh. 27; Testimony of Zadok, Miksch & Parker*)

36. According to the next sheet in the overtime book, a day or so later that same week, Officer Orr used the reconstituted list created by Sgt. Miksch to pre-charge himself for a "scheduled" overtime shift the following week (Dive Training 3/14), and Det. Zadok was charged (appropriately it appears) by "MRD" for overtime work related to an ongoing police investigation that he performed on March 9, 2007. Although the next new list was not introduced in evidence, I infer, based on these facts, that, Det. Zadok would be at the bottom of that new list, whether or not he had been properly or improperly charged by Officer Orr. I also infer that, by charging himself, Officer Orr was dropping himself to the bottom of the list, below both Officer Luca and Det. Zadok, and last in line for the next overtime opportunity. (*Exhs. 2, 4, 17; Testimony of Luca & Miksch*)

37. Sgt. Miksch immediately advised Chief Parker of Det. Zadok's complaint (I infer verbally) and was instructed to "investigate the complaint to determine if there had been any impropriates [sic] or violations of Department Rules and Regulations" in the matter. (*Exh. 27; Testimony of Zadok, Miksch & Parker*)

The CPD Internal Affairs Investigation

38. CPD Administrative Order No. ADM 4.01 effective 1-18-07 entitled "Professional Standards and Internal Investigations" describes the objectives and procedures for investigating allegations of misconduct brought against the CPD and its employees. (*Exh. 19; Testimony of Parker & Miksch*)

39. Among the provisions of this regulation:

“Formal departmental complaints of misconduct against a department employee shall be initiated by the preparation of a “To/From letter submitted to the Internal Affairs Officer.”

“Whenever the affected employee is notified that they have become the subject of an internal investigation, they shall be provided a written statement of the allegations against him/her (Notification of Charges/Allegations Form) unless the Chief determined that disclosure might jeopardize an investigation.”

“The department has established guidelines regarding which categories of complaints will be handled and investigated by the Internal Investigation Officer and those handled by a shift supervisor as part of routine discipline. . . .The criteria for determining the categories of complaints to be investigated by Internal Affairs Officer include, but are not limited to, allegations of; Corruption, Brutality, Use of excessive force; Violation of civil rights; Criminal misconduct; Violation of rules and regulations; Any other matter as directed by the Chief. . . . Criteria for the assignment of and investigation to a shift supervisor or officer-in-charge of the shift may include, but are not limited to such offenses as: Alleged rudeness; tardiness; and Minor cases of insubordination.”

“Any Internal Investigation must be completed immediately upon receipt of the complaint and must be completed within thirty (30) days. . . . If extenuating circumstances preclude completion within thirty (30) days, the officer-in-charge of Internal Investigations shall request an extension from the Chief of Police in writing and provide written notification to the employee (if previously notified of the complaint and investigation) and complainant of the delay.”

“An internal administrative investigation may inquire into a department employee’s on-duty or off-duty conduct if such inquiry is reasonable and directly related to the employee’s performance of duty, if such conduct affects the employees’ fitness or ability to continue in the police service, or reflects discredit on the department.”

“At the conclusion of any administrative investigation, a full written report shall be prepared for submission to the Chief, which shall include the following: (a) The original complaint report; (b) any additional statements taken from the complainant or statements obtained from witnesses; (c) Any statements made or reports submitted by the department employee under investigation; (d) A summary of all evidence gathered; (e) Any mitigating circumstances; and (f) an evaluation of the complaint and a definitive statement as to whether the charges made by the complainant were: SUSTAINED . . . NOT SUSTAINED . . . UNFOUNDED... EXHONERATED . . .[or] FILED.”

“The subject of the investigation shall be promptly notified of the final results of the investigation.”

(Exh. 19)

40. According to Chief Parker, ADM 4.01 was promulgated to provide general guidance in the conduct of an internal investigation, but its provisions were not meant to be followed to the letter during all investigations. It was not “unusual” for complaints made by one officer against to be resolved informally by him or the shift commander. *(Testimony of Parker)*

41. In accordance with Chief Parker’s directive, Sgt. Miksch opened Administrative Investigation IAI-2007-03 and commenced inquiry into Officer Orr’s actions. *(Exh. 27)*

42. At approximately 1:43 pm on March 9, 2007, Sgt. Miksch e-mailed Officer Orr requesting a “To/From” from him to explain whether he had charged the overtime in question, when he did so and why. The following day, Officer Orr replied:

“The Union voted that all scheduled overtime no matter what is to be charged. [G]oing to Civil Service is overtime and many of us feel it should be charged seeing some get paid to go and some do not get paid to go. I would like the Union to vote on this issue. Officers are getting 6 to 10 hours of overtime and others are getting nothing. The last time I went to civil service to testify as a witness I got charged. I believe I charged it [the Luca/Zadok overtime] on 3-8-07.”

On March 12, 2007, and again on March 13, 2007, Sgt. Miksch e-mailed Officer Orr to ask when he or any other officers were charged for going to civil service. On March 19, 2007, Sgt. Miksch spoke to Officer Orr and again asked him to supply the dates of the Civil Service and Labor Relations hearings Orr had said other officers were charged in the overtime book. Orr said he wasn’t sure but thought Officers Harriman and Rizzuto had been charged and didn’t recall the date of the civil service case when he thought he had been charged. Sgt. Miksch informed Officer Orr that he should go home and try to find the dates. About an hour later, Orr e-mailed Sgt. Miksch this response: “Harriman and Rizzuto went to LRC on June 21. I cannot find my date it was three or more years ago.” *(Exh. 6 & 27; Testimony of Appellant & Miksch)*

43. On March 19, 2007, Chief Parker delivered a letter to Officer Orr ordering him to meet with Town Counsel on Wednesday March 21, 2007. Chief Parker advised Orr that he had the right to have union representation or counsel present with him, but gave no specification of the subject matter of the meeting. Officer Orr appeared with his counsel. Sgt. Miksch also was present. (*Exhs. 39 & 43; Testimony of Appellant & Parker*)

44. During the interview by Town Counsel, Officer Orr freely acknowledged that he had charged Officer Luca and Det. Zadok in the overtime book for their appearance at the Commission on March 2, 2007. He stated that he did this after going off-duty several days later, probably on March 8, 2007. He understood the overtime book was “always a union document” and that he believed the union rules required those officers to be charged for any such “scheduled overtime” for which they received overtime pay. He stated “the only thing that we’re not supposed to get charged for [is] the court [time].” This understanding was based, in part, on conversations he said he had with Officers Harriman and Rizzuto about the union meeting and Labor Relations Commission arbitration ruling. He didn’t think to ask Chief Parker or Sgt. Miksch because “I didn’t think the Town had anything to do with it. The union had been handling it my whole time in the Department.” When asked about his statements to Sgt. Miksch about who else had been charged for overtime he said he wasn’t sure, but it was his recollection that Officers Harriman and Rizzuto had been charged for overtime which they were claiming from the June 21, 2005 arbitration case and wanted Sgt. Miksch to look into it. (*Exh. 43; Testimony of Appellant*)

45. Meanwhile, Sgt. Miksch personally reviewed an enormous volume of documents (he estimated thousands) kept in boxes containing sheets from in the overtime book and

CPD payroll records going back to 2003 to see if members had been charged on the overtime list for appearing at the Commission. Given the extent of Sgt. Miksch research into the records, it is certainly understandable how his investigation took more than 30 days to complete. (*Exhs. 7 thru 18, 27: Testimony of Miksch*)

46. On April 3, 2007, Sgt. Miksch spoke to Officers Harriman and Rizzuto. Officer Harriman confirmed that he recalled a telephone conversation with Officer Orr about the overtime list issue, but did not recall when it took place. Officer Harriman stated he did not believe he had been charged for going to the Labor Relations Commission. Officer Rizzuto also confirmed that he had been asked about the overtime issue by Officer Orr which he placed no more than three weeks earlier, i.e., the week of March 12, 2007. (*Exh. 27; Testimony of Miksch*)

47. As a result of his research, Sgt. Miksch found that Officer Brine had gone to a Commission hearing "for Officer Orr" in 2003 and that Officer Orr had gone to a Commission hearing in September 2004, but there was no corresponding overtime sheet showing either officer was charged by the union for that overtime. He found no record that Officers Rizzuto or Harriman had been charged for their appearance at the Labor Relations Commission in June 2005. (*Exhs. 7 thru 18, 27; Testimony of Miksch*)

48. Sgt. Miksch researched the union meeting in December 2006 at which the interpretation of overtime charging for "all scheduled overtime" was discussed. He also retrieved the arbitrator's decision in that case which he noted "determined that those officers that attend a hearing and are paid for their attendance, are there because the Town has ordered them to attend" and, therefore, was the same as court time that the union had determined was not to be charged. (*Exhs. 21, 27 & 41: Testimony of Miksch*)

49. On July 5, 2007, Sgt. Miksch submitted a "Report of Investigation" to Chief Parker summarizing the results of his investigation. No documents, interview notes or witness statements are attached to the report. (*Exh. 27*)

50. Sgt. Miksch's report found that Officer Orr had been less than truthful in his explanation for why he had charged Officers Luca and Zadok and that Officer Orr's motivation was to intimidate and harass those officers. Sgt. Miksch also found that Officer Orr's statements to him were untrue that other officers had been charged overtime for attending Civil Service and Labor Relations Commission hearings. Based on these findings, Sgt. Miksch concluded that Officer Orr's motivation and untruthfulness violated CPD Rules and Regulations 7.3 (Courtesy), 7.7 (Public Statements), 13.0, 13.1 & 13.2 (Reports). He recommended referral to the Carver Board of Selectmen for appropriate disciplinary action. (*Exh. 27; Testimony of Miksch*)

51. On July 23, 2007, after conferring with Town Counsel, Chief Parker forwarded Sgt. Miksch's Report of Investigation to the Carver Board of Selectmen. He believed that the allegations against Officer Orr were a "serious matter" that implicated him in behavior that "may very well intimidate" potential witnesses who were scheduled to testify at his demotion hearing. He also had in mind that there were two other pending charges against Officer Orr (presumably, the demotion decision then on appeal and another unspecified matter that Chief Parker said ultimately "was not sustained". (*Exh. 28; Testimony of Parker*)

52. On or about September 13, 2007, Chief Parker delivered a Notification of Allegations/Charges to Officer Orr, along with a Notice of Hearing and Contemplated Disciplinary Action, which advised him of the substance of the charges against him and

informed him that an appointing authority hearing on these charges was scheduled before the Carver Board of Selectmen for October 9, 2007. (*Exh. 34, 35 & 40*)

53. Approximately a year later, on September 26, 2008, the parties submitted their joint request to the Commission for a hearing pursuant to G.L.c.31,§41A, in lieu of a hearing by the Carver Board of Selectmen. (*Exh. 40*)

Testimony at the Section 41A Hearing

54. Carver called Officer Luca as its first witness. He had served as a CPD Patrol Officer for approximately 34 years and was planning for retirement in the near future. He came as close as any witness who testified to having little or no stake in the outcome of the case. I found his testimony to carry the ring of truth, without regard to which side of the dispute it benefited. (*Testimony of Luca*)

55. Officer Luca testified that he rarely accepted overtime work, except in the summer months when he would take an occasional boat patrol on weekends. Thus, he usually didn't bother to check the overtime book until the month of May. Had Det. Zadok not brought the matter to his attention, he probably would never have noticed that he had been charged in March 2007 and put at the bottom of the list since the list would likely have been revised so many times and he would have risen up to or close to the top on the list by the time he checked it again. (*Testimony of Luca*)

56. Officer Luca testified that he spoke with Officer Orr after learning that he had been charged for going to civil service. According to Officer Luca, he came away from the conversation with a clearly formed impression that Officer Orr genuinely believed that nothing was "etched in stone" about how civil service appearances were handled and that neither did he think Officer Orr intended his action as a threat or retaliation for

Luca's appearance as a witness for Carver at the Commission hearing, nor did Luca take it that way. He did testify that Officer Orr, Det. Zadok and Officer Englehart "don't get along" and agreed with the suggestion from Carver's counsel "that was probably the reason" for Orr's action. (*Testimony of Luca*)

57. Det. Zadok became a full-time CPD police officer in 1993. Since 2006, he served as the Carver Police Union steward. He freely acknowledges his dislike of Officer Orr. By way of explanation for why he didn't simply approach Orr after seeing the overtime charge sheet, Det. Zadok stated that "we don't talk". (*Testimony of Zadok*)

58. Det. Zadok acted extremely agitated and nervous during his appearance. I doubt the credibility of much of his testimony. For example, he stated that he complained to Sgt. Miksch because he thought Officer Orr was targeting him to make him look like a "rat" for going to testify at Orr's civil service demotion appeal, although it was no secret to anyone in the CPD that the two officers were arch enemies. He wasn't sure if he knew that Sgt. Miksch was the Internal Affairs officer when he went to complain to him in March 2007, although Sgt. Miksch had been performing that function for several years, ever since Chief Parker became Chief in 2004. He testified that learning he had been charged made him "upset" and was reluctant to say, even after considerable effort by Carver counsel to lead him, that he was "intimidated". His testimony was not convincing. (*Exhs. 37 & 38; Testimony of Zadok, Luca, Miksch & Parker*)

59. Sgt. Miksch presented as a seasoned professional with 14 years of service with the CPD. Sgt. Miksch claimed he harbored no lingering animus against Officer Orr, pointing to the fact that he had exonerated Officer Orr on two or three occasions in which Internal Affairs complaints (unrelated to the present issues) had been lodged. I do not doubt his

sincerity and I credit his testimony as to the facts he compiled in the course of his investigation as truthful. However, based on a preponderance of other evidence that demonstrated a certain pre-disposition against Officer Orr for a considerable period of time, I discount his opinions about Officer Orr's state-of-mind, personal motivation and truthfulness as less completely objective. (*Exh. 27 & 32; Testimony of Miksch*)

60. Sgt. Miksch was junior in seniority to Officer Orr in terms of service and his promotion to Sergeant. In April 2004, after Officer Orr had been demoted, Sgt. Miksch wrote a 4-page memorandum to the Carver Board of Selectmen through the then acting Chief of Police and the Carver Town Administrator, expressing his "significant" concerns about the "unprofessional conduct" of Officer Orr and the lack of action within the CPD chain of command to address his concerns. In this memorandum, Sgt. Miksch refers to the September 2001 cartoon incident, in which Sgt. Miksch was one of the officers unfairly depicted as a "devil", as well as being earlier called a "kiss ass" and a "suck ass" as a patrol officer and Orr was his sergeant. He stated that he has repeatedly had to listen to Officer Orr "badmouth whoever is occupying the position of Chief" and that "I fully believe that his poor attitude, both in the past and present, has greatly contributed to the poor morale that has plagued this Department for years." Sgt. Miksch also stated: "There is no doubt in my mind that Officer Orr clearly has difficult time dealing with me, or with any authority for that matter. . . .I sincerely believe his ultimate goal is to again exert the type of power and control he once had within the Department, and if he is not kept in check, I fear he will realize that goal to the detriment of the Department, and the Town as a whole. . . . I consider it perhaps the most serious obstacle facing the Department in the immediate future." (*Exhs. 22 & 27; Testimony of Miksch*)

61. Chief Parker did not attend Officer Orr's March 21, 2007 interview with Town Counsel and could not recall whether or not he had ever seen the transcript of that interview or listened to the tape of the interview. He implied, however, that "we wouldn't be here" if Officer Orr had apologized for his mistake. I believe his testimony and infer he was not aware of the apology made by Officer Orr to Town Counsel. (*Exh. 43; Testimony of Appellant & Parker*)

62. Officer Orr's testimony generally hewed to his prior statements about the incident in question. He showed a great deal of restraint, especially during tough and sometimes contentious cross-examination. He credibly described how the conflict with the CPD and the Police Union seemed to turn suddenly from the hope of a long-awaited settlement after the Commission hearing on March 2, 2007 to despair after getting news of the initiation of a new inquiry of him just a week later. He stated that, as a result of this tumultuous situation, he began counseling in April 2007. By March 2008, Chief Parker put him out on injured duty leave due to the stress he was under. (*Testimony of Appellant*)

63. Officer Orr spoke candidly about his relationship with Det. Zadok, whom he "hated" and admitted to have called him a "proven liar" and "brainwasher". He stood by his statement that he charged Det. Zadok for overtime on March 2, 2007 because he had honestly been lead to believe that, under Police Union rules, Zadok should have charged himself for overtime he received, based on information from Orr's counsel that Det. Zadok was on Carver Town Counsel's witness list. He said he did not know that Det. Zadok had been told he need not appear until he heard Chief Parker testify to that effect. He pointed out that, although Officer Englehart could be considered just as much of a nemesis as her husband Det. Zadok, Orr knew she was out on injury leave and that is why

he didn't charge her as well. Had he known the facts, as he stated to Town Counsel when he was interviewed, he would not have charged Det. Zadok either. In the absence of credible impeaching evidence, I believe this testimony as true. (*Testimony of Appellant*)

64. Officer Orr also stood by his testimony that he spoke to Officers Harriman and Rizzuto about the overtime issue before deciding to charge Det. Zadok and Officer Luca. Under cross-examination, his version of these conversations did not waver, and I believe he has been truthful about having these conversations. I note that neither Officer Harriman nor Rizzuto testified at the hearing, but I draw no adverse inference for or against either party as those witnesses were equally available to be "ordered in" or subpoenaed to the hearing. Their testimony may well simply have been largely cumulative or inconclusive. If they had a clear recollections that varied materially from what the witnesses had testified they had said, either party could have procured their appearances. (*Exh. 43; Testimony of Appellant*)

65. I also find relevant Officer Orr's uncontroverted and credible testimony that after the March 2007 overtime incident, Officer Orr's contention was taken up for discussion and voted on by the Police Union, sometime in June or July of 2007. Officer Orr did not attend that Police Union meeting. Officers Harriman and Rizzuto, and possibly others, did support Officer Orr's position that appearances at administrative hearings as a witness in a civil service or collective bargaining dispute with the CPD were not the same as "court time" on a law enforcement matter and those administrative appearances should be charged. They were outvoted. Thereafter, a new rule was posted on the Police Union bulletin board clarifying that Civil Service and Labor Relations Commission appearances

were not to be charged. Since that date, all Police Union members, including Officer Orr, have complied with this notice. (*Testimony of Appellant*)

66. Officer Orr also testified about the Arbitration Award in the dispute about paying Officers Rizzuto and Harriman for appearing as Police Union witnesses at the Labor Relations Commission. Orr acknowledged that he knows, now, that the Arbitration Award turned on the difference between being a witness for the Town and being a witness for the Police Union. In March 2007, however, he had not read the Arbitration Award itself, and was relying on what he thought it meant, which was that Labor Relations Commission appearances were not the same as a court appearance. This was also his understanding of the upshot of the Police Union meeting in December 2006, in which the minutes refer specifically only to “court”. I doubt that Officer Orr was as ignorant of the import of the Arbitration Award as he claimed, but I credit his testimony that, taken together with the December 2006 Police Union meeting, his overall understanding was a genuinely held belief. (*Exhs. 21, 41, 43; Testimony of Appellant*)

67. Officer Orr testified that his belief that “civil service was not court” was not inconsistent with his statement that he “would like the Union to vote on this issue”. He said that he made the latter statement to Sgt. Miksch because, after getting his e-mail, he realized that his interpretation (along with Officers Rizzuto and Harriman) of the Police Union December 2006 vote and prior Arbitration Award may not actually be clear and another vote should be taken to clarify the issue. I find this explanation credible and unimpeached. (*Exh. 21; Testimony of Appellant*).

68. As to Officer Orr’s statements that he was charged for attending a civil service hearing in the past, I find his recollection to have pertained to an incident in September

2004, for which he appeared as at the Commission to testify at the behest of an appellant. His Weekly Time Sheet showed that Chief Parker denied Officer Orr's request for this overtime pay on October 4, 2004. Sgt. Miksch testified that he found no overtime charge sheet on which Officer Orr had been charged for this appearance. Officer Orr explained that it was still his belief that he had been charged for overtime on this occasion and then "uncharged". The corresponding overtime sheets covering the period in question were not produced. (*Exh. 26; Testimony of Appellant & Miksch*)

69. It is possible, but implausible, that Officer Orr charged himself for the September 2004 civil service appearance and then was "uncharged" after Chief Parker denied the overtime pay. There do appear to be indicia that such deletions have been made at times on the overtime sheets, but the sheets have been copied and recopied so many times, that no clear conclusion is possible. On balance, I find that it more likely than not that Officer Orr's recollection on this particular point is faulty, albeit not knowingly false. (*Exhs. 2, 4, 7 thru 18; Testimony of Appellant*)

CONCLUSION

This case comes before the Commission pursuant to a request under G.L.c.31, §41A for a hearing before a disinterested hearing officer, in lieu of a hearing pursuant to G.L.c.41 (before the appointing authority). Section 41A provides:

"Upon the request of the appointing authority and a tenured employee, who is entitled to a hearing pursuant to the first paragraph of section forty-one, a hearing before a disinterested hearing officer, designated by the chairman of the commission, may be held in lieu of a hearing before the appointing authority. Such hearing officer shall make findings of fact and may make recommendations for decision to the commission. Following the decision of the commission, there shall be no appeal pursuant to the provisions of section forty-three; provided, however, that a petition for [judicial] review may be filed pursuant to the provisions of section forty-four. All requirements relative to written notice and the holding of hearings pursuant to this section shall be governed by those set forth in section forty-one."

Discipline of tenured employees under Section 41 requires “just cause” that comports with “basic merit principles” as defined by the Civil Service Law. G.L.c.31, §1 & §41. “Just cause” for discipline means that “the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service” Boston Police Dep’t v. Collins, 48 Mass.App.Ct. 408, 411 (2000); School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). An action is “justified” if “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 rev.den., 428 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct

inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31, §1.

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing) The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006)

In the few cases brought before the Commission under G.L.c.31, Section 41A, as opposed to the more traditional appeal from a prior appointing authority level hearing brought under Section 43, the role of the Commission has not been clearly defined nor has it been definitively judicially construed. See generally, McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473 (1995); Stockman v. Division of Medical Assistance, 20 MCSR 522 (2007); Maxfield v. Town of Charlton, 20 MCSR 63 (2007). Thus, while the basic principles of governing a “just cause” Section 43 review also apply to Section 41A, several difference in the Commission’s role under Section 41A bear notice.

In particular, under Section 43, the Commission's mandate is to determine whether an appointing authority had "reasonable justification" to find just cause for the discipline imposed. Although the Commission may have sound reason to disagree with the appointing authority's decision, the Commission is not empowered to "substitute its own judgment" for that of the appointing authority, absent a finding that the appointing authority's conclusion was based on material error of fact or law, or tainted by impermissible bias or other improper motive in violation of basic merit principles. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003); Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997)..

Similarly, under Section 43, the Commission's power "to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). In general, the Commission may not modify a the level of discipline imposed if "there was reasonable justification for [it] . . . in the circumstances found by the Commission to have existed when the appointing authority made its decision." See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited

Neither of these principles squarely fit a Section 41A case. Rather, as Carver points out in its Post-Hearing Memorandum, a Section 41A hearing officer "would stand in the shoes of the employee's appointing authority" and, here "The Commission is essentially standing in the shoes of the Town's Board of Selectmen."

Finally, in a hearing before the appointing authority under Section 41, there is no requirement that the appointing authority use a “disinterested” hearing officer to arrive at its decision, but Section 41A expressly requires one. See McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 463, 476 (1995)

In sum, in this case, the Commission has the same discretion to take any action that the Carver Board of Selectmen would be empowered to take which can be supported by the findings and recommendations made by a “disinterested” hearing officer, and are based on substantial credible evidence, common sense and correct rules of law.

Applying these principles to the facts of this case, there is no just cause to discipline Officer Orr, per se, for his conduct in charging Officers Luca and Zadok in the Carver Police Union overtime book, which was, essentially a Police Union dispute that could, and should have been resolved by the membership through union channels, and the preponderance of the credible evidence fails to establish any basis to impose discipline for Officer Orr’s alleged acts of untruthfulness, harassment or intimidation. Indeed, this Commissioner finds it troubling that so many public safety man-hours have been squandered by so many members of the CPD to make this mountain out of a mole hill.

Courtesy

Carver correctly construes CPD Rule 7.3 to mean CPD officers are expected to be courteous and considerate of their fellow officers. The right of any employer to insist upon standards of common decency in the workplace hardly needs to be codified. Carver is also correct to note that police officers have been held to “the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475 (1995). See also Boston Police Dep’t v. Collins, 48

Mass.App.Ct. 408,413 (2000); Attorney General v. McHatton, 428 Mass. 790, 793-84 (1999); Falmouth v. Civil Service Commission, 61 Mass.App.Ct. 796, 801-802 (2004)

This does not mean, however, that police officers must treat each other as if they were society guests attending an afternoon tea. In another context, it might be plausible to believe that Officer Orr was inconsiderate to have annotated the overtime book unilaterally without first approaching Det. Zadok and Officer Luca with a “heads up”. Under the circumstances, however, this slight, with no substantive consequences, is hardly grounds for serious discipline at the Board of Selectmen level. Officer Orr cannot be held solely responsible for the consequences of years of dysfunction within the CPD and the Police Union. While it is true that he and Det. Zadok keep their distance and ignore each other as much as possible, if that were a matter for discipline, it required meting out appropriate sanctions on them both or charging neither one. Indeed, based on the evidence and demeanor of the two protagonists at the hearing in this matter, if there were only one aggressor in this situation, it would be more likely Det. Zadok is that person. Moreover, I also find persuasive that, as soon as Officer Orr was apprised that Det. Zadok had not been paid overtime for March 2, 2007, Officer Orr readily admitted his error and offered an apology for his mistake. At most, this was a matter that is routinely handled by the Chief of Police or shift commander, and should have been addressed that way here.²

Truthfulness

The breach of duty imposed upon a police officer to be truthful is one of the most serious violations an officer can commit, because, among other things, it may

² Det. Zadok’s profane outburst upon learning that Officer Orr had charged him in the overtime book should be contrasted with how Officer Luca handled it, taking the episode in stride and letting it go once the problem was corrected, clearly a mature approach.

compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. See City of Cambridge v. Civil Service Comm'n, 43 Mass. 300, 303 (1997); Gallo v. Lynn, 23 MCSR 348 (2010). See also Desharnais v. City of Westfield, 23 MCSR 418 (2010); Mozeleski v. Chicopee, 21 MCSR 676 (2008); Rizzo v. Town of Lexington, 21 MCSR 634 (2008); Layne v. Town of Tewksbury, 20 MCSR 372 (2007) . Since there is some discretion as to what, and for how long, a prosecutor may be required to make disclosure of indicia of a police officer's untruthfulness under the so-called "Brady Rule", the corollary to this principle means that claims of untruthfulness against a police officer must be carefully scrutinized. See generally, United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). See also Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); "*Police Officer Truthfulness and the Brady Decision*", 70 POLICE CHIEF, No. 10 (Oct. 2003) reprinted at policechiefmagazine.org.

Officer Orr makes a persuasive argument that the CPD's rules on truthfulness (7.7 [Public Statements] and 13.1 & 13.2 [Reports]), concern statements made in connection with on-duty CPD work and in official CPD reports. The preponderance of evidence warrants the conclusion that the overtime charge book is a Police Union document, not an official CPD document or report and that, pursuant to Article VI of the collective bargaining agreement, the entries into that book are made by "union personnel" either "on duty" or "off duty". Thus, Officer Orr's "off-duty" entries in the overtime book do not violate the letter of any of the CPD Rules with which he is charged.

I also agree that the issue of whether or not Officer Orr had the authority to charge another officer for overtime he believed should be charged for appearing as a witness at a Commission hearing is, properly, a Police Union matter, as it does not arise out of any duties Officer Orr performed as a CPD officer. The evidence established that at least two other officers (Harriman and Rizzuto) thought as did Officer Orr that such charges were appropriate. The fact that Officer Orr was in the minority and was ultimately outvoted by his Police Union colleagues does not establish a basis upon which to discipline him as a CPD officer for untruthfulness for taking a position on a Police Union matter that he believed was reasonably justified.

Carver stands on stronger grounds to allege that Officer Orr violated CPD Rules by being untruthful in the course of the investigation of the charges against him. Although, initially, a Police Union matter on the merits of his action in charging Det. Zadok and Officer Luca, Officer Orr still had the duty to speak truthfully once an official CPD investigation had been opened. After carefully considering the evidence in this record, I conclude that the preponderance of evidence failed to establish that, in fact, Officer Orr was untruthful in any of his statements to Sgt. Miksch, Town Counsel or anyone else.

- As to Officer Orr's alleged statement that he was assessed an overtime charge for his appearance at a Commission hearing, the most that the evidence established in that regard was that he had a faulty memory on that score. The evidence falls short of proving a guilty state of mind, which it was Carver's burden to establish.
- As to Officer Orr's alleged untruthfulness in claiming that he had spoken to Officers Harriman and Rizzuto prior to charging the overtime book as opposed to afterward, I credit his testimony and the other evidence that supports his version

of the facts.³ The evidence to the contrary amounts to the conclusion by Sgt. Miksch in his July 2007 report, concerning certain hearsay statements made to him by Officers Harriman and Rizzuto, from which he infers that Officer Orr could not have spoken to those officers until a week after he had written in the overtime book. I do not draw that inference, however, as I do not find the hearsay statements (not documented by interview notes and recounted months after the conversations occurred) to outweigh the direct evidence to the contrary presented to me at the hearing that is consistent with Officer Orr's recollections throughout the investigation.

- As to Officer Orr's statement that Officers Harriman and Rizzuto had been charged for overtime for their attendance at the Labor Relations Commission, the evidence established only that Officer Orr stated, more than once, that he "thought" they had been charged. The evidence does not establish that he was untruthful in this regard.
- As to Officer Orr's statement that he charged Det. Zadok and Officer Luca as a result of a "union vote", the evidence established that there was such a union vote in December 2006 and that Officer Orr understood the vote to distinguish "court" time (that was not to be charged) from all other "scheduled overtime", which included non-judicial appearances at administrative hearings (that was supposed to be charged). The evidence clearly established that Officers Orr Harriman and Rizzuto were on the losing side of this proposition, as the subsequent Police Union vote and clarifying notices confirmed. However, neither the governing

³ Other than the dispute about the timing of these conversations, there was no credible dispute that the conversations occurred and that the substance of those conversations is precisely as Officer Orr related them.

language of the collective bargaining agreement, nor the July 2006 Arbitration Award, nor the December 2006 Police Union minutes, are so explicit as to have left no room for reasonable minds to differ on that point at the time Officer Orr took the action in question. Being wrong about how the Police Union resolved the ambiguity in the collective bargaining agreement, however, is not sufficient to prove untruthfulness. Officer Orr deserved no discipline for pressing a position he believed should have been the appropriate way to apportion overtime in a "fair and equitable" manner as the collective bargaining agreement provides. If a member of the Police Union believed Officer Orr's actions were out-of-line, he could have been "spoken to" by an appropriate member of the Police Union Executive Board as such similar situations were handled in the past.

Retaliation

Carver's remaining charge asserted that Officer Orr's conduct was an act of retaliation intending to intimidate Det. Zadok and Officer Luca because of their status as potential future witnesses against him in the Commission hearing on Officer Orr's demotion. Not a charge to be taken lightly, the evidence fell short of proving it.

Officer Orr steadfastly denied any motive to intimidate or retaliate. There was no evidence of any physical confrontation. Officer Luca spoke to Officer Orr about the incident and did not view Officer Orr's behavior as retaliatory or intimidating. Det. Zadok said he was "upset" and considered being charged "f---ing bullshit". He did not claim to be intimidated until he was led by Town Counsel to that conclusion and his testimony in this regard was not credible. Based on his demeanor at the hearing of this matter and the well-known and long-festering animus between them, no inference can be

drawn that he was put in fear of any physical, emotional or other consequences merely by seeing that Officer Orr had annotated the overtime book.


Far stronger evidence of retaliation against Officer Orr came through evidence of the degree to which this dispute escalated. Rather than simply take the matter up through the Police Union, which was the arbiter of the overtime charging issue, Det. Zadok went straight to the CPD Internal Affairs officer, Sgt. Miksch who, himself, had made clear his prior views about Officer Orr, dating back to 2001. For Det. Zadok to say he was not sure that Sgt. Miksch then acted as the Internal Affairs officer is not credible.

Moreover, the irregularities in the procedures followed corroborate a likely predisposition of the investigation. Chief Parker credibly explained that the specific details for Professional Standards and Internal Investigations prescribed by the CPD's Administrative Order No. 4.01 were meant as guidelines, and might need to be tailored to fit the circumstances of any particular situation. Here, however, the material deviations are far too numerous to be discounted solely as investigatory discretion.

The investigation was initiated without any formal written complaint. The presumptive 30-days to complete the investigation stretched to 90-days. Another two months elapsed before Chief Parker formally notified Officer Orr of the charges against him. Sgt. Miksch's report does not reflect contact with Officer Luca, the other party allegedly targeted by Officer Orr. The report to Chief Parker contained no written witness statements. Had Chief Parker had the transcript or tape of Town Counsel's interview, he would have known that Officer Orr did, in fact, apologize for his mistake, within weeks after the incident and, as Chief Parker testified "we wouldn't be here."

As a final note, the Commission should take this opportunity to exhort all personnel in the CPD (Officer Orr included) to strive to work on rehabilitating their relationships. While no direct evidence suggests the rift within the CPD and Police Union has adversely affected the citizens of Carver, civil service employees, especially public safety personnel, must bring their best game to work every day. Personality conflicts are inevitable in nearly every setting. All parties are encouraged to use prudence when it comes to workplace conflicts and, as unpleasant as it may seem, to "bury the hatchet" and try to work out personnel issues directly and collaboratively, with the Golden Rule in mind, rather than deviously and unilaterally, before they are allowed to escalate again as they did in this case.

In sum, it is recommended that the Commission decide that the preponderance of the substantial credible evidence fails to establish reason to conclude that Officer Orr's mistakes in handling the overtime charging incident rise to the level of a violation of any WPD department rules and regulations for which he should be suspended for any period of duty.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on April 21, 2011.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Regina M. Ryan, Esq. (for Appellant)

Brian M. Maser, Esq. (for Appointing Authority)